United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 29, 2010

TO : James J. McDermott, Regional Director

Region 31

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Hotel Bel Air 530-6050-0100

Case 31-CA-29521 530-6050-0120 530-6050-0140 530-6067-0100

530-6067-2090

The Region submitted this Section 8(a)(1) and (5) case for advice as to whether the Employer violated the Act by insisting to impasse on a permissive subject of bargaining. We conclude that the Region should dismiss the charge, absent withdrawal, because, regardless of whether the parties were at impasse, there is no evidence that the Employer insisted on a permissive subject of bargaining.

FACTS

The Hotel Bel Air ("Hotel" or "Employer") is a historic five star hotel owned and managed by the Dorchester Group; the group is owned by the Brunei Investment Agency, an investment arm of the government of Brunei's ministry of finance. UNITE HERE! Local 11 ("Union") and the Employer have been signatory to several collective bargaining agreements, the most recent of which expired on September 30, 2009. By letter dated July 31, the Employer informed the Union that the Hotel would be shutting down completely for major renovations that were expected to take approximately two years to complete. By early August, the parties agreed that they would meet to bargain over the effects of the hotel's closure for renovations.

The parties met six times between August 25 and October 1 to bargain over the effects of the closure and then continued to bargain through a series of letters until mid-November. At the first bargaining session on August 25, the Employer presented its initial Separation Pay Plan and Waiver and Release Agreement in which it proposed one week of severance pay for each year worked, with a 26-week cap. The proposal did not include health insurance benefits and required laid-off employees to waive their right to reinstatement (as distinguished from reemployment) in order to receive severance pay. The Union did not object to or mention the language of the Waiver Agreement.

¹ All dates refer to 2009 unless otherwise indicated.

Rather, the Union emphasized its position that the dollar amount of the severance was too low, that the Employer should provide health and welfare benefits during the shut down, and that the employees should retain their recall rights. The Employer maintained its position that employees would have to make an election between monetary severance and recall rights. At the next session, the Union presented a counterproposal that would provide three months severance pay for each year worked, maintenance of health and welfare benefits during the shutdown, and the employees' right of reinstatement. The Union continued to maintain that severance should not be conditioned upon employees giving up any right to recall.

By the parties' fifth bargaining session, the Union was still seeking continuous health and welfare benefits during the closure, severance pay of 1.5 months pay for each year worked if the employee wanted recall rights and 2.5 months for each year worked if the employee surrendered recall rights, and a "me too" successor agreement. In contrast, the Employer was offering two weeks severance pay for every year worked for employees not wanting recall rights, a \$900 lump sum payment for the employee to use towards health care or other expenses, and no severance pay for employees who wanted recall rights. From late September to mid-October, the parties primarily negotiated the language for recall rights, with the Union requesting an assurance that an employee opting for recall rights over severance would be guaranteed a position, while the Employer would only guarantee the employee would be recalled if qualified for the position.

On September 18 the Employer submitted what it referred to as its final proposal, though the parties continued to negotiate with give and take through October. By letter of November 4, the Employer withdrew its "final Separation Pay Plan proposal" of September 18 and substituted "a new separation pay proposal." The letter stated in pertinent part:

In the new proposal the financial terms of the Separation Pay Plan remain unchanged. However, the terms of the release have been amended. As we have repeatedly explained, the financial terms offered on September 18 were, and remain, the Hotel's final offer with respect to separation pay.

The pertinent language of the amended Waiver and Release Agreement states:

In consideration for the separation pay to be provided to the Employee under the terms of the . . . 2009
Separation Pay Plan, Employee hereby unconditionally and irrevocably forever releases, acquits and forever discharges THE HOTEL . . . from any and all claims, demands, liens, agreements, contracts, covenants, actions, suits, causes of action, obligations, debts, expenses,

damages, judgments, orders and liabilities of whatever kind or nature in law, equity or otherwise, including those under the Age Discrimination in Employment Act, as amended ("ADEA"), the Rehabilitation Act, as amended, the Employee Retirement Income Security Act, as amended ("ERISA"), the Family Medical Leave Act, as amended ("FMLA"), the California Fair Employment and Housing Act, the California Constitution, the California Labor Code, and the California Business and Professions Code, whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden, which Employee now owns or holds or has at any time heretofore owned or held as against these THE HOTEL Affiliates, inclusive of, and without limiting the generality of the foregoing, any and all claims, demands, agreements, obligations and causes of action, known or unknown, suspected or unsuspected by Employee arising out of or in any way connected with any agreements, transactions, policies, practices, occurrences, acts or omissions regarding Employee's employment relationship with the THE HOTEL Affiliates occurring prior to the date hereof.

The Employer did not implement its final proposal; nor did it distribute the release to employees. The Union did not respond to the Employer's November 16th letter. Rather, on November 24, the Union filed this charge alleging that the Employer violated Sections 8(a)(5) and (1) of the Act by insisting to impasse over permissive subjects when it bargained with the Union about the effects of the hotel closure. The Union made its first reference and objection to the Employer's Waiver and Release Agreement in a January 22, 2010 letter to the Region.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal because, even assuming that the parties were at impasse, there is no evidence that the Employer insisted upon the Waiver and Release Agreement or that the Waiver and Release Agreement contributed to the impasse in any discernable way. The Region should therefore dismiss the charge, absent withdrawal.

In collective-bargaining, either party is free to make proposals on permissive subjects.² Each "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum" nor insist upon the permissive subject as a

² NLRB v. Borg-Warner Corp., 356 U.S. 324, 349 (1958).

^{3 &}lt;u>Detroit Newspapers</u>, 327 NLRB 799, 800 (1999), citing <u>Longshoremen ILA v. NLRB</u>, 277 F.2d 681, 683 (D.C. Cir. 1960) and

condition precedent to reaching agreement. 4 Thus, a party may not "continue to insist upon acceptance of the proposal to the point of impasse 'in the face of a clear and express refusal by [the other party] to bargain about the nonmandatory subject."5 Insistence to impasse upon permissive subjects violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."6 In contrast, a party may lawfully include a permissive proposal in a bargaining package and bargain even to the point of impasse over that package, if both parties voluntarily engage in bargaining over the permissive proposal. Moreover, the "'mere fact of an impasse coincidental to continued disagreement on a nonmandatory subject of bargaining'" does not trigger an unfair labor practice. 8 Accordingly, there is no violation if a party's insistence on the nonmandatory proposal did not "contribute[] to the impasse in any discernible way."9

As an initial matter, we conclude that the Employer's Waiver and Release Agreement is a permissive subject of bargaining. The Employer's Waiver and Release Agreement is a

Taft Broadcasting Co., 274 NLRB 260, 261 (1985). See also, Pratt Tower, Inc., 339 NLRB 157, 170 (2003).

⁴ Borg-Warner Corp., 356 U.S. at 349; Latrobe Steel Co. v.NLRB, 630 F.2d 171, 179 (3rd Cir. 1980).

⁵ Pleasantview Nursing Home, 335 NLRB 961, 963 (2001), quoting Union Carbide Corp., 165 NLRB 254, 255 (1967).

⁶ Borg-Warner Corp., 356 U.S. at 349.

⁷ KCET-TV, 312 NLRB 15, 15 (1993).

⁸ Detroit Newspapers, 327 NLRB 799, 800 (1999), rev'd on other grounds 216 F.3d 109 (D.C. Cir. 2000) (citation omitted), quoting Latrobe Steel v. NLRB, 630 F.2d 171, 181(3d Cir. 1980). See also Union Carbide Corp., 165 NLRB 254, 255 (1967), aff'd sub nom. Oil, Chemical and Atomic Workers Local 3-89 v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968) (no violation where union did not oppose employer's injection of nonmandatory issue until its inclusion in employer's final offer, four weeks after the issue was first presented).

⁹ ACF Industries, 347 NLRB 1040, 1042 (2006) (impasse not invalidated where employer's insistence on nonmandatory subject did not contribute to the parties' impasse); Taft Broadcasting Co., 274 NLRB 260, 261 (1985) (valid impasse reached where nonmandatory subject was just one of several unresolved issues); see also Branch Int'l Serv., 310 NLRB 1092, 1103 n. 20 (1993), enfd. 12 F.3d 213 (6th Cir. 1993) ("An unlawful impasse on a nonmandatory subject is reached not where the nonmandatory subject is merely present in the impasse offer, but where the presence of the nonmandatory subject itself gives rise to the impasse.") (citations omitted).

general release purporting to waive a litany of past and future claims relating to the employment relationship, 10 rather than a narrow, specific release "inextricably intertwined" with severance pay, a mandatory subject of bargaining. 11

However, we further conclude that the Employer did not violate the Act by including that permissive subject in its final offer because it did not insist on the Waiver and Release Agreement and there is no evidence that this issue contributed to the impasse in any discernable way. The Union at no time tested the Employer's resolve by objecting to the Waiver and Release or demanding that the Employer remove the subject from the table. There is no evidence that the parties ever discussed the Waiver and Release at all. The first time the Union specificially objected to the permissive subjects contained in the Waiver and Release Agreement was two months after it filed this charge. Rather, the parties focused their discussions on health, welfare, and pension benefits, recall rights, and severance pay and it was those mandatory subjects and not the Waiver and Release Agreement that were the stumbling blocks in negotiations. 12

We reject the Union's argument that the Employer's mere inclusion of the permissive subject in its final offer is evidence of bad faith. The Union points to <u>Grosvenor Orlando Associates</u>, Ltd., 13 where the Board found that the employer's

 $^{^{10}}$ Borden, Inc., 279 NLRB 396, 399 n.5 (1986) (release that required employee waiver of future claims was so attenuated and unrelated to the payment of severance pay that it constituted a permissive subject of bargaining); see also Kelsey-Hayes Co. a/k/a TRW, Case 8-CA-36737, Advice Memorandum dated February 28, 2007 (broad waiver and release was a nonmandatory subject of bargaining where it was not specifically related to, or interwined with a mandatory subject).

¹¹ See Regal Cinemas, Inc., 334 NLRB 304, 305 (2001), enf'd, 317 F.3d 300 (D.C. Cir. 2003) (release was mandatory subject of bargaining where it was not a general release, but rather a specific release linked only to "claims arising from the termination of the employees—the very same employment transaction that occasioned bargaining over severance pay.").

¹² See <u>Union Carbide Corp.</u>, 165 NLRB at 254-255 (inclusion of nonmandatory subject of bargaining in employer's "package proposals" was not a factor in causing the impasse where the union never clearly and expressly refused to bargain about the nonmandatory subject and the parties' disagreement on the overall basic contract resulted in the impasse); <u>Taft</u>

<u>Broadcasting Co.</u>, 274 NLRB at 261 (valid impasse reached where nonmandatory subject was "not the issue over which the parties reached impasse" and was just one of several unresolved issues).

¹³ 336 NLRB 613 (2001).

inclusion of a nonmandatory subject of bargaining in its last and final offer and its declaration of impasse was evidence of bad faith. 14 However, in the absence of other evidence indicating bad faith bargaining, the Board has subsequently refused to find that an employer's inclusion of a nonmandatory subject of bargaining in its final offer violates the Act. 15 Specifically, in ACF Industries, the Board emphasized that in Grosvenor, its finding of a violation of Section 8(a)(5) was based on overall bad faith bargaining. 16 The Board stated that in the absence of evidence that the employer's insistence on the nonmandatory subject of bargaining contributed to the impasse in any discernable way or that the employer's overall course of conduct evinced a lack of desire to reach an agreement, it would not find a Section 8(a)(5) violation. 17 Here, where there is no evidence that the Employer evinced a lack of desire to reach an agreement with the Union, or that the Employer's insistence on this proposal contributed to an impasse, Grosvenor does not compel a conclusion that the Employer's inclusion of a permissive subject in its final offer was unlawful.

Accordingly, the Region should dismiss this Section 8(a)(1) and (5) charge, absent withdrawal.

B.J.K.

¹⁴ Grosvenor Orlando Associates, Ltd., 336 NLRB at 615-617.

 $^{^{15}}$ ACF Industries, 347 NLRB at 1042.

¹⁶ Ibid.

¹⁷ Ibid.